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NO. 82-693

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

STATE OF ILLINOIS,

Petitioner,

v.

RONALD STRUEBIN, Ancillary Administrator of the Estate of Joel F. Struebin, deceased; KATHLEEN S. POTTER, Ancillary Administrator of the Estate of James Potter; DAVENPORT BANK AND TRUST, Ancillary Administrator of Both Estates; and STATE OF IOWA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Iowa

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STATUTORY PROVISIONS AND RULES OF COURT

Ill. Ann. Stat., ch. 37 § 439.8(d)

The court shall have exclusive jurisdiction to hear and determine the following matters:

> (d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universitites System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern

Illinois University, the Board of Regents of the Regency of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

Iowa Rule of Civil Procedure 66

66. Special appearance. A defendant may appear specially for the sole purpose of attacking the jurisdiction of the court, but only before taking any part in a hearing or trial of the case, personally or by attorney, or filing a motion, written appearance, or pleading. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If the special appearance is erroneously overruled, defendant may plead to the merits or proceed to trial without waiving such error.

Iowa Rule of Civil Procedure 177

177. Demand for jury trial.

(a) Jury trial is waived if not demanded according to this rule; but a demand once filed may not be withdrawn without consent of all parties not in default.

(b) A party desiring jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue. If filed with the petition, the jury demand shall be served with the original notice and petition. If filed after the petition, the jury demand shall be served and filed in accordance with R.C.P. 82.

(c) Unless limited to a specific issue, every such demand shall be deemed to include all issues triable to a jury. If a limited demand is filed, any other party may, within ten days thereafter or such shorter time as the court may order, file his demand for a jury trial of some or all other issues.

(d) Notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court, in its discretion on motion and for good cause shown, but not ex parte, and upon such terms as the court prescribes, may order a trial by jury of any or all issues.

STATEMENT OF THE CASE

Respondents adopt Petitioner's Statement of the Case.

ARGUMENT

I

Petitioner Has Not Shown Sufficient Reasons to Support a Writ of Certiorari

There is no valid distinction between this case and Nevada v. Hall, 440 U.S. 410, 99 S.Ct. 1433, 59 L.Ed.2d 416 (1979), reh den 441 U.S. 917, 99 S.Ct. 2018, 60 L.Ed.2d 389 (1979). Illinois relies upon Footnote 24 of that opinion and claims that this is a case where "different state policies might require a different analysis or a different result." However, Illinois does not, as it cannot, indicate what these alleged "different state policies" are. Illinois cannot seriously claim that its state policy is to negligently maintain its roadways, so it attempts to draw spurious factual distinc-

tions between these cases. Illinois argues that the Nevada state employee who was negligently driving a state car on state business within California was engaged in a "non-governmental activity." Illinois claims that the Nevada employee's actions "were neither of a sovereign nature nor of any benefit to the State of California." In contrast, Illinois argues that its snow removal on the Iowa side of the interstate bridge is a typical responsibility of a sovereign which benefitted both Iowa and Illinois. It serves nothing to label driving a car "non-governmental activity" while asserting that snow removal is "of a sovereign nature." Illinois' employees performing snow removal in Iowa were no more nor no less on state business than the Nevada employee driving in California as part of his duties. The distinction is ludicrous

and presents no "different state policies."

The only substantive state policies involved in this case are the same as those in Nevada v. Hall, supra. In this case Illinois has a $100,000 limitation upon recoveries in tort claims brought against it. Ill. Ann. Stat., ch. 37 § 439.8(d) (Smith-Hurd). Iowa has a policy of providing full compensation to those injured on its highways. State Tort Claims Act, Chapter 25A, Code of Iowa (1978); Hunt v. State, 252 N.W.2d 715 (Iowa 1977). This is the same policy dichotomy as was urged by Nevada in Nevada v. Hall, supra. There is no reason to simply rehash that issue in this case.

Illinois also appears to argue that this exercise of jurisdiction causes problems with interstate agreements of this type, although it stops short of labeling this a "substantial threat to our

constitutional system of cooperative federalism" or an interference with its capacity to fulfill its own sovereign responsibilities. Economic warfare will not result from Illinois being required to respond for its negligence within Iowa in Iowa courts. The so-called "interstate solution of elegance" involved here could simply be made more "elegant" by contractual provisions for indemnification or some similar adjustment if the states wish to limit their liability for extra-territorial torts. This is hardly a substantial threat to cooperative federalism.

II

Illinois is Not a "Person" Protected by the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States nor is it Threatened by Unequal Treatment

Illinois raises the argument for the first time that it will be subjected to different procedural requirements in Iowa

because the case could be decided by a jury. The only difference in treatment asserted by Illinois before the Iowa Supreme Court was its statutory limitation on recovery. Not only was this new ground not preserved for appeal, but it is not a ground upon which one makes a special appearance. A special appearance is for the sole purpose of attaching the jurisdiction of the court, not to contest procedural requirements or to raise a conflict of laws. See Iowa Rule of Civil Procedure 66.

Furthermore, this contention exists in a vacuum. Even assuming, arguendo, that plaintiffs could have demanded a jury as to Illinois, they did not. The right to a jury trial is waived if not so demanded. Iowa Rule of Civil Procedure 177(a).

In any event, the Equal Protection Clause of the Fourteenth Amendment extends

protections to "persons", not to states. It makes a mockery of the language of the Fourteenth Amendment to urge otherwise. As stated by this Court in Pennsylvania v. New Jersey, 426 U.S. 660, 96 S.Ct. 2333, 49 L.Ed.2d 124 (1976): "The short answer to these contentions is that both clauses protect people, not States." 426 U.S. at 665. See also, South Carolina v. Katzenbach, 338 U.S. 301 (1966).

CONCLUSION

There are no special or important reasons for the Court to exercise its discretion and grant review on writ of certiorari. This is not a state court decision on an important question of federal law which has not been, but should be, settled by this Court. See generally, Rule 17(1)(c), Rules of the Supreme Court of the United States. This question was decided by Nevada v. Hall. The Petition for a Writ of Certiorari should be denied.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that on the 18th day of November, 1982, three copies of this Brief in Opposition to Petition for a Writ of Certiorari were mailed postage prepaid, pursuant to Rule 28(c) of the Rules of the Supreme Court of the United States, to the counsel and parties listed below. I further certify that all parties required to be served have been served.

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